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No. 92-2026

In the Supreme Court of the United States

OCTOBER TERM, 1993

VISTA PAINT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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The petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on September 24, 1992, Pet. App. 2a, and the federal parties filed a timely petition for rehearing on October 8, 1992, C.A. Record, 10/8/92 Entry, which was denied on February 17, 1993. Pet. App. 59a-60a. Petitioner filed a petition for rehearing on October 13, 1992, beyond the 14 days allowed by Fed. R. App. P. 40(a). C.A. Record, 10/13/92 Entry. That petition for rehearing was denied on March 22, 1993. Pet. App. 61a-62a.

Supreme Court Rule 13 provides that "if a petition for rehearing is *timely* filed in the lower court by any party

in the case, the time for filing the petition for a writ of certiorari for all parties * * * runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment" (emphasis added). Accordingly, the time to file a petition for certiorari in this case expired on May 18, 1993, which was 90 days from the denial on February 17, 1993, of the United States' timely petition for rehearing. Since the petition for certiorari was filed on June 21, 1993, it is out of time, and this Court lacks jurisdiction over the case. *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); *Citizens Bank* v. *Opperman*, 249 U.S. 448, 450 (1919).

Petitioner's filing of an untimely petition for rehearing in the court of appeals had no effect on the time within which to file a petition for certiorari. As this Court explained in *Pfister* v. *Finance Corp.*, 317 U.S. 144, 150 (1942):

> where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts—if any are offered—support, grounds for opening the original order and determines that no grounds for a reëxamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order.

Accord *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940); *Federal Trade Commission* v. *Minneapolis-Honeywell*, 344 U.S. 206 (1952). In denying petitioner's untimely petition for rehearing, the court of appeals simply stated that "[t]he panel has voted to deny [petitioner's] petition for partial rehearing." Pet. App. 62a. Nothing in the court's order suggests that the court did more than determine that the petition failed to set forth grounds for reexamination of the original order. See *Pfister*, 317

U.S. at 150. Thus, the court of appeals' denial of petitioner's untimely petition for rehearing did not operate to enlarge the time for filing a petition for certiorari.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

AUGUST 1993